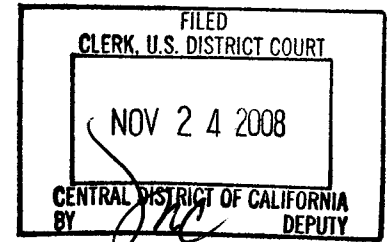


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Michael [Signature]
DEPUTY CLERK



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

JOE A. HOUGHTON,

Petitioner,

v.

M.S. EVANS, Warden

Respondent.

Case No. CV 08-07556 RSWL (AN)

**ORDER TO SHOW CAUSE RE
DISMISSAL OF PETITION FOR
WRIT OF HABEAS CORPUS BY A
PERSON IN STATE CUSTODY AS
TIME-BARRED**

I. BACKGROUND

Before the Court is a petition for a writ of habeas corpus ("Petition") brought by Joe A. Houghton ("Petitioner"), a state prisoner proceeding *pro se*. The Petition is brought pursuant to 28 U.S.C. § 2254 and it raises four claims directed at Petitioner's 2004 conviction and related prison sentence of fifteen years to life plus one year in state prison that he sustained following a jury trial in the Los Angeles County Superior Court (No. VA078683). (Pet. 2.) For the reasons set forth below, Petitioner is ordered to show cause why his Petition should not be dismissed with prejudice because it is time-barred.

II. DISCUSSION

A. Standard of Review

Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. foll. § 2254, states that “the judge to whom [the petition] is assigned” is required to examine the petition promptly and “[i]f it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the petitioner to be notified.” Local Rule 72-3.2 of this Court also provides “[t]he Magistrate Judge promptly shall examine a petition for writ of habeas corpus, and if it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief, the Magistrate Judge may prepare a proposed order for summary dismissal and submit it and a proposed judgment to the District Judge.” C.D. Cal. R. 72-3.2. Further, an untimely habeas petition may be dismissed *sua sponte*, however, the district court must give the petitioner adequate notice and an opportunity to respond before doing so. *Day v. McDonough*, 547 U.S. 198, 209-10, 126 S. Ct. 1675 (2006); *Herbst v. Cook*, 260 F.3d 1039, 1043 (9th Cir. 2001).

B. Statute of Limitations

The Petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), which establishes a one-year statute of limitations for state prisoners to file a habeas petition in federal court. 28 U.S.C. § 2244(d)(1). In most cases, the limitation period begins to run from “the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review.” 28 U.S.C. § 2244(d)(1)(A).

The face of the Petition, attached exhibits, and relevant state court records^{1/}

^{1/} The Court takes judicial notice of Petitioner’s records in the state appellate courts, which are available on the Internet at <http://appellatecases.courtinfo.ca.gov>. See *Smith v. Duncan*, 297 F.3d 809, 815 (9th Cir. 2002) (federal courts may take (continued...))

1 show Petitioner sustained his underlying conviction and sentence on September 13,
 2 2004. (Pet. 2; Official records of California courts.) On direct review, Petitioner filed
 3 a timely appeal with the California Court of Appeal that affirmed the judgment and
 4 sentence on December 28, 2005. (Pet. 2-3.) The Petition and relevant state court
 5 records also establish that the California Supreme Court denied his petition for review
 6 on March 15, 2006, and that Petitioner never filed a petition for certiorari with the
 7 United States Supreme Court. (Pet. 3; No. S140808; Official records of California
 8 courts.) Therefore, for purposes of AEDPA's limitation period, his judgment of
 9 conviction became final on June 13, 2006, the ninetieth day after his petition for
 10 review was denied by the California Supreme Court and the date his time for seeking
 11 review with the United States Supreme Court expired. *Barefoot v. Estelle*, 463 U.S.
 12 880, 887, 103 S. Ct. 3383 (1983); *Bowen v. Roe*, 188 F.3d 1157, 1158-59 (9th Cir.
 13 1999) (the period of "direct review" in 28 U.S.C. § 2244(d)(1)(A) includes the period
 14 within which a petitioner can file a petition for writ of certiorari from the United States
 15 Supreme Court). The limitation period then started to run the next day, June 14, 2006,
 16 and ended a year later on June 13, 2007. 28 U.S.C. § 2244(d)(1)(A); *see also*
 17 *Patterson v. Stewart*, 251 F.3d 1243, 1245-47 (9th Cir. 2001) (the limitations period
 18 begins to run on the day after the triggering event pursuant to Fed. R. Civ. P. 6(a)).

19 Petitioner missed the deadline because he did not constructive file the pending
 20 Petition until November 5, 2008^{2/} -- 511 days after the statute expired. Therefore, the

21
 22 ^{1/} (...continued)
 23 judicial notice of relevant state court records in federal habeas proceedings).

24 ^{2/} Pursuant to the "mailbox rule," a *pro se* prisoner's habeas petition is
 25 deemed to be filed on the date the prisoner delivers the petition to prison authorities
 26 for mailing to the clerk. *Houston v. Lack*, 487 U.S. 266, 270-71, 108 S. Ct. 2379
 27 (1988); *Huizar v. Carey*, 273 F.3d 1220, 1222 (9th Cir. 2001). The mailbox rule also
 28 applies to *pro se* state habeas petitions. *Stillman v. Lamarque*, 319 F.3d 1199, 1201
 (9th Cir. 2003). The pending Petition was filed by the Clerk on November 17, 2008,
 (continued...)

1 pending Petition is time-barred unless Petitioner is entitled to statutory or equitable
 2 tolling, or an alternate start date to AEDPA's statute of limitations period under 28
 3 U.S.C. § 2244(d)(1).

4 **C. Statutory Tolling**

5 AEDPA provides a statutory tolling provision that suspends the limitation
 6 period for the time during which a "properly-filed" application for post-conviction or
 7 other collateral review is "pending" in state court. 28 U.S.C. § 2244(d)(2); *Bonner v.*
 8 *Carey*, 425 F.3d 1145, 1148 (9th Cir. 2005). An application is "pending" until it has
 9 achieved final resolution through the state's post-conviction procedures. *Carey v.*
 10 *Saffold*, 536 U.S. 214, 220, 122 S. Ct. 2134 (2002). The limitation period is not tolled
 11 between the time a final decision is issued on direct state appeal and the time a state
 12 collateral challenge is filed because there is no case "pending" during that interval.
 13 *Thorson v. Palmer*, 479 F.3d 643, 646 (9th Cir. 2007); *Nino v. Galaza*, 183 F.3d 1003,
 14 1006 (9th Cir. 1999). On collateral review, however, "intervals between a lower court
 15 decision and a filing of a new petition in a higher court," when reasonable, fall "within
 16 the scope of the statutory word 'pending'" thus tolling the limitations period. *Saffold*,
 17 536 U.S. at 221, 223; *Evans v. Chavis*, 546 U.S. 189, 192, 126 S. Ct. 846 (2006)
 18 (*citing Saffold*).

19 On March 8, 2007 -- 267 days after the one-year limitation period started to run
 20 on June 14, 2006 -- Petitioner constructively filed his first state habeas petition with
 21

22 ^{2/} (...continued)

23 however, for purpose of the timeliness analysis, the Court gives Petitioner the benefit
 24 of the doubt by assuming he constructively filed the Petition on November 5, 2008,
 25 the date he signed it. (Pet. 10.) Petitioner is not entitled to the benefit of the
 26 constructive filing date of his original federal habeas petition that he signed on May
 27 6, 2008, because the petition was dismissed without prejudice as an unexhausted
 28 petition. (*See* No. CV 08-03264 RSWL (AN), Docket Nos. 7, 9.) In any case, as the
 following analysis makes clear, even with the benefit of the earlier filing date, the
 Petition is still untimely.

1 the Norwalk County Superior Court and, on April 20, 2007, the petition was denied,
2 leaving 98 days remaining before the limitation period expired. (Pet. 4, Ex. C, No.
3 VA078683; Official records of California courts.) Under AEDPA, Petitioner is not
4 entitled to statutory tolling for this 267-day period, because there was no case
5 “pending” during this interval. *See Thorson*, 479 F.3d at 646; *Nino*, 183 F.3d at 1006.

6 Petitioner is entitled to statutory tolling from March 8, 2007, to April 20, 2007,
7 the 43-day period during which his first state habeas petition was pending in the
8 superior court. 28 U.S.C. § 2244(d)(2); *Bonner*, 425 F.3d at 1148. Statutory tolling
9 for this time extended the limitation period from June 13, 2007, to July 26, 2007.

10 Petitioner then waited until May 15, 2008 -- another 391 days after the first state
11 habeas petition was denied on April 20, 2007, to file his second state habeas petition
12 with the California Supreme Court.

13 In *Chavis*, the United States Supreme Court recently held that, in the absence
14 of a clear direction or explanation from the California Supreme Court as to what
15 constitutes a “reasonable time” (or the legislative enactment of a determinate time
16 limit), federal courts must conduct a case-by-case determination of whether the subject
17 filing delay “was made within what California would consider a ‘reasonable time.’”
18 *Chavis*, 546 U.S. 198-99. In *Chavis*, the Supreme Court applied the foregoing
19 principles and found “a totally unexplained, hence unjustified” period of at least six
20 months filing delay to be unreasonable under California law. *Id.* at 201. The Supreme
21 Court stated:

22 [s]ix months . . . is far longer than the ‘short period[s] of
23 time,’ 30 to 60 days, that most States provide for filing an
24 appeal to the state supreme court. (citation omitted). It is
25 far longer than the 10-day period California gives a losing
26 party to file a notice of appeal in the California Supreme
27 Court (citation omitted). We have found no authority
28 suggesting, nor found any convincing reason to believe, that

1 California would consider an unjustified or unexplained
2 6-month filing delay ‘reasonable.’ Nor do we see how an
3 unexplained delay of this magnitude could fall within the
4 scope of the federal statutory word ‘pending’ as interpreted
5 in *Saffold*.”

6 *Id.*; see also *Waldrip v. Hall*, No. 07-55512, slip op. at 5-6 (C.D. Cal. Feb. 11, 2008)
7 (adopting and interpreting *Chavis*’ determination that an unjustified delay of more
8 than six months is unreasonable).

9 Additionally, the Supreme Court provided the following guidance for
10 determining timeliness:

11 [T]he Circuit must keep in mind that, in *Saffold*, we held
12 that timely filings in California (as elsewhere) fell within
13 the federal tolling provision *on the assumption* that
14 California law in this respect did not differ significantly
15 from the laws of other States, i.e., that California’s
16 ‘reasonable time’ standard would not lead to filing delays
17 substantially longer than those in States with determinate
18 timeliness rules.

19 *Chavis*, 546 U.S. at 199-200 (citing *Saffold*, 536 U.S. at 222-23); see also Cal. R. Ct.
20 28(e)(1) (allowing only ten days to file a petition for review of a decision by the court
21 of appeal, including habeas corpus decisions.)

22 Petitioner states he “never received a case number, nor response” to the first
23 habeas petition that he filed in the superior court. (Pet. ¶6(a), Ex. C.) This statement
24 does not justify or explain his 391-day delay in filing his second habeas petition with
25 the state high court for the following reason. In accordance with the Court’s authority
26 to take judicial notice of relevant state court records in federal habeas proceedings, see
27 *Smith*, 297 F.3d at 815, the Court contacted the Norwalk Superior Court and has
28 determined that, on April 18, 2007, the superior court issued an order denying the first

1 state habeas petition (“4/18/07 Order”) that was filed and mailed to Petitioner on
2 April 20, 2007. A copy of the 4/18/07 Order is attached to this Order as Exhibit 1.^{3/}
3 Under the circumstances, the Court finds Petitioner cannot justify or explain his
4 inordinate delay. Indeed, even if Petitioner did not receive a copy of the superior
5 court’s 4/18/07 Order because it was lost in the prison mail room or never delivered
6 to him shortly after it was mailed, Petitioner has not provided a reasonable explanation
7 for his failure to inquire about the status of his first state habeas petition within a
8 reasonable time after he constructively filed it. In this regard, Petitioner also fails to
9 explain why he found it was appropriate to file his second habeas petition with the
10 state high court 391 days after his first state habeas petition was denied on April 20,
11 2007, even though he still had not ostensibly received any response from the superior
12 court. *See Chavis*, 546 U.S. at 198-99; *compare In re Stankewitz*, 40 Cal. 3d 391, 396-
13 97 n.1 (1985) (“Assuming that . . . the delay was substantial,” petitioner met his
14 burden of showing circumstances sufficient to justify the delay.) Consequently, the
15 Court finds statutory tolling is unwarranted for the 391-day period running from April
16 20, 2007, to May 15, 2008. It is clearly “longer than the ‘short period[s] of time,’ 30
17 to 60 days, that most States provide for filing an appeal to the state supreme court,”
18 and “far longer than the 10-day period California gives a losing party to file a notice
19 of appeal in the California Supreme Court.” *Chavis*, 546 U.S. at 199-200 (finding no
20 bright line rule, but determining six month delay not reasonable); *Waldrip*, No. 07-

22 ^{3/} The Court notes the 4/18/07 Order is four pages in length and the first page
23 of the Order correctly identifies Petitioner’s name in the case caption and first
24 sentence, and it bears the correct case number assigned to his first state habeas
25 petition. Further, the substance of the order, including, *inter alia*, the date of
26 conviction, the nature of offense, and the length of sentence, accurately summarizes
27 Petitioner’s conviction and sentence in the trial court. However, the last sentence of
28 the 4/18/07 Order erroneously refers to Petitioner as “Mike Bush.” (Ex. 1 at 4:1-2.)
The Court finds this error appears to stem from the superior court’s use of a prior order
as a form and its coterminous oversight in revising the order.

1 55512, slip op. at 5-6; *see e.g., Forrister v. Woodford*, No. 1:05-CV-00170 LJO
 2 WMW HC, 2007 WL 809991, at *2-3 (E.D. Cal. Mar. 15, 2007) (eighty-eight day
 3 delay unreasonable); *Ray v. Marshall*, No. CV F 06-1898 DLB HC, 2007 WL
 4 3096157, at *3-4 (E.D. Cal. Oct. 22, 2007) (139 day delay unreasonable).

5 Therefore, the second habeas petition in the state high court was constructively
 6 filed after the statute of limitation period expired, and has no tolling consequence. *See*
 7 *Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th Cir. 2003) (“[S]ection 2254 does not
 8 permit the reinitiation of the limitations period that has ended before the state petition
 9 was filed”); *Jiminez v. Rice*, 276 F.3d 478, 482 (9th Cir. 2001) (stating that filing of
 10 state petition after AEDPA’s one-year time period has elapsed bars federal habeas
 11 review); *Webster v. Moore*, 199 F.3d 1256, 1259 (11th Cir. 2000) (“A state-court
 12 petition [] that is filed following the expiration of the limitations period cannot toll that
 13 period because there is no period remaining to be tolled”).

14 Accordingly, the Petition is untimely by 468 days (the amount of untolled time
 15 between the new limitation deadline (07/26/07) and the Petition’s constructive filing
 16 date (11/05/08)).

17 **D. Alternative Start of the Statute of Limitations**

18 **1. State-Created Impediment**

19 In rare instances, AEDPA provides that its one-year limitation period shall run
 20 from “the date on which the impediment to filing an application created by State action
 21 in violation of the Constitution or laws of the United States is removed, if the
 22 applicant was prevented from filing by such State action.” 28 U.S.C. § 2244(d)(1)(B).
 23 Asserting that the statute of limitations was delayed by a state-created impediment
 24 requires a showing of a due process violation. *Lott v. Mueller*, 304 F.3d 918, 925 (9th
 25 Cir. 2002). The face of the Petition and attached exhibits do not set forth any facts
 26 showing that Petitioner is entitled to relief under this provision.

27 **2. Newly Recognized Constitutional Right**

28 AEDPA provides that, if a claim is based upon a constitutional right that is

1 newly recognized and applied retroactively to habeas cases by the United States
2 Supreme Court, the one-year limitation period begins to run on the date which the new
3 right was initially recognized by the United States Supreme Court. 28 U.S.C. §
4 2244(d)(1)(C). The face of the Petition and attached exhibits do not set forth any facts
5 that show Petitioner is entitled to relief under this provision.

6 **3. Discovery of Factual Predicate**

7 AEDPA also provides that, in certain cases, its one-year limitation period shall
8 run from “the date on which the factual predicate of the claim or claims presented
9 could have been discovered through the exercise of due diligence.” 28 U.S.C. §
10 2244(d)(1)(D). The face of the Petition and exhibits do not set forth any facts showing
11 that Petitioner is entitled to relief based upon a late discovery of the factual predicate.

12 **E. Equitable Tolling**

13 As a prefatory matter, the Court observes there is no clearly established federal
14 law that expressly holds equitable tolling is available under § 2244(d)(1), and the
15 Supreme Court has recently acknowledged this point. *Lawrence v. Florida*, 549 U.S.
16 327, 127 S. Ct. 1079, 1085 (2007) (“We have not decided whether § 2244(d) allows
17 for equitable tolling. [] Because the parties agree that equitable tolling is available,
18 we assume without deciding that it is.”).

19 “Generally, a litigant seeking equitable tolling bears the burden of establishing
20 two elements: (1) that he has been pursuing his rights diligently, and (2) that some
21 extraordinary circumstance stood in his way.” *Pace v. Diguglielmo*, 544 U.S. 408,
22 418, 125 S. Ct. 1807 (2005). A petitioner bears the burden of alleging facts that would
23 give rise to tolling. *Id.*; *Miranda v. Castro*, 292 F.3d 1063, 1065 (9th Cir. 2002). The
24 Ninth Circuit has emphasized that determinations of “whether there are grounds for
25 equitable tolling are highly fact-dependent.” *Whalem/Hunt v. Early*, 233 F.3d 1146,
26 1148 (9th Cir. 2000) (en banc). “[E]quitable tolling is justified in few cases,” and “the
27 threshold necessary to trigger equitable tolling [under AEDPA] is very high, lest the
28 exceptions swallow the rule.” *Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003).

1 The face of the Petition and attachments do not set forth any facts showing Petitioner
2 is entitled to equitable tolling. However, even assuming, without finding, his
3 explanation for statutory tolling were also raised in support of equitable tolling, the
4 explanation would not entitle Petitioner to equitable tolling for the same or similar
5 reasons. (*See* Section II.C.)
6

7 **ORDER**

8 Based upon the foregoing, the Court finds the Petition, attached exhibits, and
9 relevant state court records indicate it is untimely. Accordingly, Petitioner shall have
10 until **December 15, 2008**, to file a written response and show cause why his Petition
11 should not be dismissed with prejudice because it is time-barred. In responding to this
12 Order, Petitioner must show by declaration and any exhibits what, if any, factual or
13 legal basis he has for claiming that the Court's foregoing analysis is factually or
14 legally incorrect, or that AEDPA's one-year statute of limitations should be tolled, or
15 the start date extended. If Petitioner contends he is entitled to tolling because of a lack
16 of access to the prison law library due to a purported lockdown or some other state-
17 created impediment, his written response must be supported by a declaration from the
18 warden or prison librarian verifying that the law library and library materials were
19 unavailable throughout the relevant time period because of the lockdown or other
20 stated reason. Further, Petitioner must demonstrate that, during the time that access
21 to the prison law library was allegedly unavailable, he made requests for legal
22 materials to be brought to his cell and those requests were denied.

23 ///

24 ///

25 ///

1 Habeas Corpus. The People have not filed a response. Defendant
2 claims that he is entitled to because: (1) the prosecution
3 "illegally suppressed petitioner's statements"; and, (2) trial
4 counsel failed to present evidence of a toxicology report
5 showing that the victim was under the influence of PCP at the
6 time of the murder. After considering the Motion, including
7 attachments, the records and files in the case, the court HEREBY
8 RULES AS FOLLOWS:

9 PERTINENT FACTS

- 10 1. On or about November 10, 2003, an Information was filed
11 alleging that defendant had committed one count of
12 murder, two counts of making terrorist threats and
13 special allegations regarding the use of a dangerous or
14 deadly weapon. On or about July 19, 2004, Defendant
15 proceeded to trial.
- 16 2. On or about July 22, 2004, the prosecution objected to
17 any evidence regarding PCP. The court sustained the
18 prosecution's objection and refused to permit evidence of
19 PCP.
- 20 3. On or about July 23, 2004, the Defendant presented
21 evidence. That same day, the prosecution and defense
22 stipulated regarding the contents of a taped conversation
23 between defendant and an investigator.
- 24 4. On or about July 27, 2004, the jury found defendant not
25 guilty of first degree murder, guilty of second degree
26 murder and guilty of only one of the two counts of
27 criminal threats. With respect to the murder charge, the
28 jury found that the defendant had personally used a
dangerous and deadly weapon, namely a knife.

- 1 5. On or about September 13, 2004, the court sentenced
2 Defendant to 16 years to life in prison, representing 15
3 years to life in prison on count one followed by one year
4 based upon Defendant's personal use of a knife. The
5 court further sentenced defendant to the midterm of two
6 years in state prison on the criminal threats conviction,
7 with the two years running concurrently to 16 years to
8 life in prison.
- 9 6. Defendant appealed, and on or about April 11, 2006, the
10 Court of Appeal affirmed defendant's convictions.
- 11 7. On or about March 13, 2007, Defendant filed this Petition
12 for Writ of Habeas Corpus. Defendant claims that he is
13 entitled to because: (1) the prosecution "illegally
14 suppressed petitioner's statements"; and, (2) trial
15 counsel failed to present evidence of a toxicology report
16 showing that the victim was under the influence of PCP at
17 the time of the murder.

18 DISCUSSION

19 A defendant seeking a writ of habeas corpus bears the
20 burden of establishing the grounds for his release. People v.
21 Duvall, (1995) 9 Cal.4th 464, 474. In this case, Defendant has
22 made only vague allegations. Defendant has failed to state
23 with particularity the facts upon which relief is sought and
24 include copies of reasonably available documentary evidence
25 supporting the claim. Id. To the extent Petitioner's claims
26 are specific, Petitioner has failed to show a prima facie case
27 entitling him to relief. In re Crow, (1971) 4 Cal.3d 613,
28 624. Further, all of defendant's claims could have been
raised upon his direct appeal, but were not. In re Dean,

1 (1970) 12 Cal.App.3d 264, 267. Accordingly, Petitioner Mike
2 Bush's Writ is HEREBY DENIED.

3 IT IS SO ORDERED.

4 Dated: April 18, 2007


JUDGE, LOS ANGELES SUPERIOR COURT